

6159/cj

"PATENT APPLICATION"

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Before the Board of Patent Appeals and Interferences

In re Application of

JAMES D. KROL

U.S. Serial No. 10/692,857

Group Art Unit 1781

Filed: October 27, 2003

L. Tran, Examiner

LOW CARBOHYDRATE FOOD PRODUCT  
AND METHOD OF MAKING THE SAME

September 7, 2010  
Alexandria, Virginia

Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

R E P L Y   B R I E F

Dear Sir:

This reply brief is submitted to the Examiner's Answer mailed July 7, 2010 to respond to the primary new points or arguments raised by the Examiner. Failure to respond to each point raised by the Examiner should not be taken as acquiescence.

Applicant relies on the abbreviations set forth in its Appeal Brief. The Examiner's Answer at pages 3-8 merely recites the rejections set forth in the official action

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mailed November 10, 2009 and addressed in applicant's Appeal Brief.

Accordingly, this reply brief addresses the Examiner's arguments set forth in the Examiner's Answer at pages 8-15. For convenience, applicant's reply brief will use the headings of the Examiner and set forth the pertinent pages from the Examiner's Answer.

A. Rejection of Claims 11-15 Under 35 U.S.C. §112,  
Second Paragraph, as Being Indefinite (Pages 8-9)

The Examiner references page 10 of the Appeal Brief and applicant's argument that the claim language "a base layer of non-liquid ingredients" is definite because it is an ingredient which is not a liquid. The Examiner argues at page 8 that "[t]his argument is not persuasive because the specification does not define 'non-liquid ingredients' as appellant now asserts." This is not correct. Specifically, applicant sets forth at page 10 of its Appeal Brief page 7 of the specification which specifically states that:

A dough layer in a traditional pizza is generally a mixture that consists essentially of flour or meal and a liquid, such as water or milk, and is stiff enough to knead or roll.

Instead, the pizza of the present invention has a base layer which is comprised of a formulated

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flour (dry ingredients) and a cheese mixture...  
(emphasis added)

Thus, a liquid is defined as water or milk or providing a mixture stiff enough to kneed a roll. Additionally, there is absolutely no requirement that the claim language "non-liquid ingredients" appear in the specification. Clearly the claim language "non-liquid ingredients" is definite.

The Examiner further argues at page 9 that:

No one will argue that vegetables and fruits are liquid but they are considered as liquid containing ingredients; thus, their inclusion in claims that exclude non-liquid ingredient makes the claims unclear and indefinite (emphasis added)

As argued in applicant's Appeal Brief and agreed to by the Examiner, vegetables and fruits are not a liquid. The claim language is not directed to "non-liquid containing ingredients" rather it is directed to "non-liquid ingredients."

Applicant has complied with the requirements 35 U.S.C. §112 as set forth in applicant's Appeal Brief and the rejection should be reversed.

B. Rejection of Claims 11-14 and 22-36  
Under 35 U.S.C. §103(a) (Pages 9-15)

The Examiner's Answer at pages 9-15 responds to certain points raised in applicant's Appeal Brief by page

number and is not the model of clarity. Additionally, the Examiner makes a number of conclusory statements which are not supported by the references of record or any other evidence.

With respect to the Deep Dish Pizza reference, the Examiner argues at page 10 that:

On page 17 of the appeal brief, appellant argues that the base layer of the deep dish pizza comprises Italian cheese and the liquid mixture of cream cheese, eggs, cream, parmesan and spices. The examiner respectfully disagrees with appellant. The recipe teaches to sprinkle the cheese over the bottom of the dish and pour the egg mixture over the cheese layer. Thus, the cheese layer is the base layer because it is at the bottom and the egg mixture is an additional layer on top of the cheese layer.

This argument and interpretation of the Deep Dish Pizza reference is made throughout the Examiner's Answer.

Applicant respectfully submits that this is not a proper interpretation of the Deep Dish Pizza reference. Rather, as set forth in applicant's Appeal Brief at pages 16-17, the base layer of the Deep Dish Pizza reference is the Italian cheese and the liquid mixture of cream cheese, eggs, cream, parmesan and spices. The reference teaches that these materials are baked for about fifteen minutes and allowed to stand for five minutes. Thereafter, other ingredients are

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spread on top of this base layer such as pizza sauce, mozzarella, etc. The cheese of the Deep Dish Pizza recipe does not comprise the base layer.

The Examiner's incorrect interpretation of the Deep Dish Pizza recipe provides an incorrect premise for the Section 103 rejection based on the Deep Dish Pizza and Google Groups references. If the Board disagrees with the Examiner's interpretation of the Deep Dish Pizza recipe, applicant respectfully submits that rejections of the claims based thereon must be reversed for this reason alone.

The Deep Dish Pizza consists of a base layer of cheese and a liquid mixture. There is no basis for substituting the Google Groups reference to use "a little flour and some whey protein" for the liquid cream and egg mixture of the Deep Dish Pizza recipe.

Applicant argues at page 18 of its Appeal Brief that the Google Groups reference "apparently teaches a traditional pizza crust that uses, apparently, among other things, 'a little flour and some whey protein'." The Examiner argues that the Google Groups reference does not disclose a conventional pizza crust that uses a little flour and some whey protein in addition to other things. However,

the Google Groups reference is so sparse that it is not clear what is disclosed; including whether the pizza crust is a conventional pizza crust or not a conventional pizza crust. Further, the author of the Google Groups reference states that "I haven't tried them, so I hesitate to recommend them right now." Thus, there is no clear teaching from the Google Groups reference.

At pages 12 and 13 of the Examiner's Answer, the Examiner addresses dependent claims 12, 13 and 35. The Examiner argues that the limitations in these dependent claims would have been obvious to one skilled in the art. However, the Examiner does not indicate where in the cited references the disclosed limitations are found. Rather, the Examiner merely argues making the conclusory statements that the claimed limitations are known to one skilled in the art and provides no evidence therefor. Admittedly, the claim limitations of claims 12, 13 and 35 are not disclosed or suggested in the references relied upon by the Examiner. The Examiner has the burden of establishing obviousness and mere conclusory statements as to what is allegedly known to one skilled in the art is not a proper basis for the rejections of the dependent claims.

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The Examiner's sole argument with respect to claims 27, 28, 30, 31, 32 and 34 is as follows:

On pages 26-33 (sic), appellant makes the same argument for claims 27, 28, 30, 31, 32, 34 as for claims 11, 12, 13, 35 above. The argument is not persuasive for the same reason set forth above. (Examiner's Answer, page 13)

However, the limitations of independent claims 27 and 31 are different from claim 11 and are specifically addressed and argued by applicant. For the reasons set forth in its Appeal Brief, applicant respectfully submits that these claim elements are not disclosed or suggested by the cited references. Further, a combination of the cited references do not provide the claimed invention in claims 27 and 31. This is readily apparent from the combination of these references as set forth in applicant's Appeal Brief at pages 18-20.

The Examiner addresses method claim 22 at pages 14 and 15 of the Examiner's Answer. The Examiner again relies upon the improper interpretation of the Deep Dish Pizza recipe. Applicant's Appeal Brief specifically set forth the sequence of steps used by a combination of the Deep Dish Pizza recipe and the Google Groups reference and the Low Carb Pizza and the Google Groups reference at pages 18-20 of

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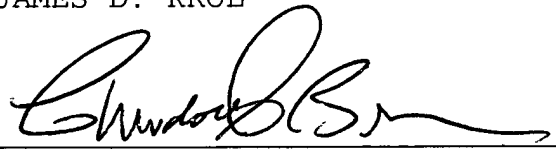
applicant's Appeal Brief. This sequence of steps is clearly not disclosed in claim 22. For example, claim 22 requires one baking of the pizza. The Deep Dish Pizza recipe requires two bakings, namely first baking the base layer of cheese and the liquid mixture and then applying the toppings and a second baking of the pizza.

For the reasons set forth in applicant's Appeal Brief and herein, applicant respectfully requests that the rejections be reversed.

Respectfully submitted,

JAMES D. KROL

By



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